Supreme Court, U.S.
FILED
MAR 14 1991
OFFICE OF THE CLERK

(2)

No. 90-1279

In The

Supreme Court of the United States

October Term, 1990

MYRA JO COLLINS,

Petitioner,

vs.

THE CITY OF HARKER HEIGHTS, TEXAS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROY L. BARRETT
STUART SMITH
NAMAN, HOWELL, SMITH & LEE
P.O. Box 1470
Waco, Texas 76703
(817) 755-4100

ROY L. BARRETT
Attorney of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 4

CONCLUSION 15

TABLE OF AUTHORITIES

Page

Cases

City of Canton, Ohio v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) 7, 8

Collins v. City of Harker Heights, Texas, 916 F.2d 284 (1990) 1, 13

Cornelius v. Town of Highland Lake, Alabama, 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990).....8, 9, 10, 11, 13

de Jesus Benavides v. Santos, 883 F.2d 385 (5th Cir. 1989)..... 5

Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).....6, 14

Davidson v. Cannon, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986)..... 6

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989).....6, 13

Hogan v. City of Houston, 819 F.2d 604 (5th Cir. 1987)..... 5

McClary v. O'Hare, 786 F.2d 83 (2d Cir. 1986).... *passim*

Parratt v. Taylor, 451 U.S. 527, 101 S.Ct 1908, 68 L.Ed.2d 420 (1981).....7, 15

Rankin v. City of Wichita Falls, Texas, 762 F.2d 444 (5th Cir. 1985)..... 5, 13, 14, 15

Ruge v. City of Bellevue, 892 F.2d 738 (8th Cir. 1989) .*passim*

Stoneking v. Bradford Area School District, 882 F.2d 720 (3d Cir. 1989), *cert. denied*, 110 S.Ct. 840, 107 L.Ed.2d 835 (1990).....8, 12

TABLE OF AUTHORITIES – Continued

Page

Walker v. Rowe, 791 F.2d 507 (7th Cir.) *cert. denied*, 479 U.S. 994, 107 S.Ct. 597, 93 L.Ed.2d 597 (1986) .. 6, 7, 14

Washington v. District of Columbia, 802 F.2d 1478 (D.C. Cir. 1986)..... 6, 7, 14

Rules and Statutes

42 U.S.C. § 1983..... *passim*

Federal Rule of Civil Procedure 12(b)(6)..... 2

No. 90-1279

In The

Supreme Court of the United States

October Term, 1990

MYRA JO COLLINS,

Petitioner,

vs.

THE CITY OF HARKER HEIGHTS, TEXAS,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, the City of Harker Heights, Texas ("the City") respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner, Myra Jo Collins, seeking review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered on November 2, 1990.

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Court Below

Petitioner Myra Jo Collins is the widow of Larry Michael Collins. Mr. Collins, while employed by the City, died after voluntarily entering a sewer line without taking appropriate precautions. Petitioner filed suit on June 14, 1989, claiming that the City violated Mr. Collins' constitutional rights by allegedly failing to properly train Mr. Collins in certain workplace procedures. The City responded by promptly filing, on July 7, 1989, a Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted. After considering the briefs of each party, the District Court issued its written opinion on October 30, 1989, holding that the City had not violated a constitutionally protected right of Mr. Collins. The District Court then entered a Judgment dismissing Petitioner's Complaint. Petitioner timely filed a Notice of Appeal appealing the District Court's Judgment to the Fifth Circuit. The Fifth Circuit affirmed the District Court's decision in a published opinion.

The Fifth Circuit, following ample authority from both within and from outside the Fifth Circuit and also following and citing ample Supreme Court authority, correctly identified the controlling issue in the case and affirmed the District Court's decision. The Fifth Circuit held that Petitioner had failed to state a claim under Section 1983 since the claim alleged failed to satisfy a necessary element to a claim – the abuse of government power standard. The Fifth Circuit stated the question presented and its holding as follows:

> The question presented in this case is whether a plaintiff seeking recovery under Section 1983 for injury to a governmental employee must demonstrate, inter alia, that the conduct in issue was an abuse of governmental power. More particularly, does alleged wrongful conduct by government – in its capacity as employer rather than as a governing authority – that deprives its employee of an alleged constitutional right give rise to a Section 1983 action? We base our holding on the abuse of government power standard, separate from the constitutional deprivation element or standard.
>
> * * *
>
> Keeping the standards in mind, we turn to Collins' complaint, in which she makes the requisite *Monell* and *City of Canton* allegations, charging that the City's "custom and policy of deliberate indifference towards the safety of its employees" violated the constitutional rights of her deceased husband. This notwithstanding, our holding is grounded in the abuse of power standard, which pertains to the decedent's relationship with the City – one of employer and employee, rather than one in which the City, as government, acted against the decedent, as governed. Therefore, it is not necessary to reach another of the standards, or elements, necessary for a Section 1983 action – whether there was a deprivation of a constitutional right.
>
> * * *
>
> There was no abuse of government power. . . . Accordingly, this action cannot lie under Section 1983.
>
> The judgment of the district court is AFFIRMED.

Collins v. City of Harker Heights, Texas, 916 F.2d 284, 286, 287, 291 (1990).

Since Petitioner did not and could not properly allege or show an abuse of government power, i.e., that the City acted against the decedent as governed, the Fifth Circuit held that Petitioner had not stated a Section 1983 claim. Following the Fifth Circuit's affirmance, Petitioner sought a Writ of Certiorari from this Court.

Statement of Facts

While the City strongly disagrees with the "facts" pled by Petitioner, it is generally correct, as Petitioner asserts, that the facts pled must be assumed to be correct on a motion to dismiss. Since the Court cannot consider the City's view of the facts when ruling on the appropriateness of a motion to dismiss, the City will not attempt to color the Court's view by setting forth its version of the facts. As only the "facts" pled by Petitioner are relevant to the Court's determination at this point, the City respectfully refers the Court to the Statement of Facts contained in Petitioner's Petition for Writ of Certiorari which quotes much of Plaintiff's Original Complaint.

REASONS FOR DENYING THE WRIT

Petitioner asserts two reasons for this Court to grant the Petition for Writ of Certiorari. First, Petitioner points to the split in Circuit authority on the only real issue

presented by the case, i.e., whether Petitioner must show an abuse of government power, and, second, Petitioner asserts that the Court should use this case as a vehicle to address an issue reserved in another case but which is not at issue in this case. Neither of the reasons asserted by Petitioner justify grant of the Petition for Writ of Certiorari. The two grounds advanced by Petitioner will be discussed below in turn.

First Ground – Split in Circuits

Petitioner's first basis for asking this Court to grant the Petition for Writ of Certiorari is the recent creation of a split in the Circuits on the sole issue presented by the case. The sole issue presented by the case is whether an employee of a municipality who seeks to hold the municipality liable under 42 U.S.C. Section 1983 must also plead and prove an abuse of government power, that is, that the act complained of was an act of government in its capacity as government taken against the plaintiff in his or her status as governed. Until the Eighth Circuit's recent decision in *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989), all of the Circuits which had addressed the issue had uniformly held that an employee did not have a cause of action against his government employer where all the government had done was to act as an employer and had not acted as government against one governed in such a manner as to be an abuse of government power. The Fifth Circuit has been the leader in this area, having addressed the issue three times prior to the instant case coming before it. *de Jesus Benavides v. Santos*, 883 F.2d 385 (5th Cir. 1989); *Hogan v. City of Houston*, 819 F.2d 604 (5th Cir. 1987); *Rankin v. City of Wichita Falls, Texas*, 762 F.2d 444

(5th Cir. 1985). The District of Columbia, Second, and Seventh Circuits have also all addressed the issue and held that, under similar factual circumstances, the employee did not have a cause of action under Section 1983. *Washington v. District of Columbia*, 802 F.2d 1478 (D.C. Cir. 1986); *Walker v. Rowe*, 791 F.2d 507 (7th Cir.), *cert. denied*, 479 U.S. 994, 107 S.Ct. 597, 93 L.Ed.2d 597 (1986); *McClary v. O'Hare*, 786 F.2d 83 (2d Cir. 1986).

The Fifth Circuit did not create the split among the Circuits about which Petitioner complains; rather, the Eighth Circuit created the split. The City submits that the Eighth Circuit's decision in *Ruge* is an aberration and that there is no need to correct the Eighth Circuit's decision.

This case would be an appropriate vehicle for correcting the *Ruge* decision if it could be argued that a lack of clarity exists in the Supreme Court's decisions which has allowed the differing interpretations reached, on the one hand, by the Fifth Circuit and the other Circuits above mentioned and, on the other hand, by the Eighth Circuit. There is, however, no such lack of clarity. Under the decisions of this Court, it is clear that an employee does not have a Section 1983 cause of action against his municipal employer unless the employee can plead and prove the requisite abuse of governmental power. *See DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S. Ct. 998, 103 L.Ed.2d 249, 259 (1989) ("the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression' ") (citing *Davidson v. Cannon*, 474 U.S. 344, 348, 106 S.Ct. 668, 88 L.Ed.2d 677, 682 (1986)); *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662,

668 (1986) (" ' "to secure the individual from the arbitrary exercise of the powers of government" ' " and "to prevent governmental power from being 'used for purposes of oppression' ") (internal citations omitted); *Parratt v. Taylor*, 451 U.S. 527, 549, 101 S.Ct. 1908, 68 L.Ed.2d 420, 438 (1981) (Powell, J., concurring in result) (to prevent the "affirmative abuse of power"). As can be seen from *Washington*, *Walker*, and *McClary*, the District of Columbia, Second, and Seventh Circuits have all understood the law in this area, as clearly has the Fifth Circuit. There is no confusion in this area mandating attention by the Supreme Court. The Eighth Circuit, for reasons unknown, decided to create a cause of action which is not permitted under the decisions of this Court. Any other Circuit court which reads the decisions of this Court, and of the other Circuits which have addressed the issue, will follow the decisions of this Court and of the District of Columbia, Second, Fifth, and Seventh Circuits and not the Eighth Circuit. This Court, therefore, need not take this case merely to correct the one aberrational decision of the Eighth Circuit.

The Eighth Circuit and Petitioner herein both rely on this Court's recent decision in *City of Canton, Ohio v. Harris* for the proposition that an employee has a Section 1983 claim against his municipal employer for the employer's failure to properly train the employee. 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). In fact, this Court reached exactly the opposite conclusion in *Canton*. *Canton* involved a plaintiff who, while in police custody, was allegedly denied adequate medical care due to a failure to properly train police officers. *Canton* does not hold that an employee who is injured due to a failure

to properly train may state a Section 1983 cause of action. The specific language of *Canton* states that it applies only when the failure to train injures a non-employee of the governmental entity: "We hold today that the inadequacy of police training may serve as the basis for Section 1983 liability *only* where the failure to train amounts to deliberate ~~indifference~~ *to the rights of persons with whom the police come into contact.*" 103 L.Ed.2d at 426 (emphasis added). *Canton* therefore applies only to injuries to third parties and not to injuries to governmental employees. Accordingly, *Canton* does not in any manner stand for the proposition for which Petitioner and the Eighth Circuit contend that it does.

In an effort to bolster her argument concerning a split among the Circuits, Petitioner argues that there are several Circuits, at least by implication, on the other side of the issue from the Fifth Circuit. This is simply not correct. *Ruge* is the only decision in conflict with the other Circuits. Petitioner argues that the instant decision conflicts with those of the Second Circuit in *McClary*, the Eleventh Circuit in *Cornelius*, and the Third Circuit in *Stoneking*. *McClary v. O'Hare*, 786 F.2d 83 (2d Cir. 1986); *Cornelius v. Town of Highland Lake, Alabama*, 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990); *Stoneking v. Bradford Area School District*, 882 F.2d 720 (3d Cir. 1989), *cert. denied*, 110 S.Ct. 840, 107 L.Ed.2d 835 (1990). As discussed below, these decisions are not in conflict with the Fifth Circuit's decision.

The *McClary* court reached the same result and used the same analysis as the Fifth Circuit. In *McClary*, the plaintiff's deceased husband worked for the county highway department. While in the course of his employment,

the plaintiff's husband was struck by the boom of a crane and died. The plaintiff brought suit against the county, among others, under 42 U.S.C. Section 1983. The plaintiff alleged that the county violated state safety laws by failing to properly inspect and maintain the crane and by allowing the operator to operate the crane without a required certificate of competency. The plaintiff further alleged that the conduct of the defendants was reckless and that the county had an established policy of disobeying state and federal safety regulations. The district court dismissed the plaintiff's complaint for failure to state a claim and the court of appeals affirmed. In affirming the dismissal, the court of appeals noted that "the only fact distinguishing this case from an ordinary tort action brought by an employee against an employer is the identity of that employer" and that the Constitution "does not provide a remedy to a public employee that would not be available to a private employee subject to identical conduct by his employer." 786 F.2d at 89. As can be seen from the foregoing discussion of *McClary*, there is no conflict between the *McClary* holding and the holding in the instant case. To the contrary, the holding in *McClary* is consistent with the holding of the Fifth Circuit in the case at bar.

Petitioner next argues that the Fifth Circuit's decision in this case conflicts with the Eleventh Circuit's decision in *Cornelius*. In *Cornelius*, the plaintiff, the clerk of the defendant town, brought suit against the town and others after she was abducted by state prison inmates assigned to a community work squad. The district court granted a summary judgment in the defendants' favor after finding that the plaintiff failed to present a genuine issue of

material fact regarding whether the defendants owed her a duty to protect her from the criminal actions of work squad inmates in the Alabama correctional system. The Eleventh Circuit reversed the summary judgment because the Eleventh Circuit found that the plaintiff had presented a genuine issue as to whether a special relationship existed between the defendants and the plaintiff and whether the defendants were aware that she faced special danger from the work squad inmates. If such a special relationship existed or if the defendants were aware of a special danger, then the plaintiff had a Section 1983 claim for failure to provide adequate protection. The Eleventh Circuit did not hold that only municipal employees could bring Section 1983 claims against their employers when a special relationship or special danger existed and adequate protection was not provided. While the fact that the town clerk worked for the defendant town was a factor in whether a special relationship or special danger existed in *Cornelius*, a private citizen would have the same cause of action if a special relationship or special danger existed. For example, a citizen who entered the town hall for a meeting and who was injured by one of the work squad inmates should have the same Section 1983 claim against the town. Thus, *Cornelius* did not create a cause of action which is available only to municipal employees and which exists only by reason of the employment relationship.

The holding of the Eleventh Circuit in *Cornelius* does not conflict with the Fifth Circuit's holding in the instant case. *Cornelius* did not involve, as does the case at bar, a suit by an employee against a municipal employer for injuries received by the employee in the normal course of

employment. The government was not held subject to Section 1983 liability in *Cornelius* because it was an employer, or for its action as an employer, but rather because it misused its power as government in the management of prison inmates. In *Cornelius* it was clear that an abuse of governmental power was involved and this was not at issue in the case. The government was acting in its unique capacity as government when it exposed the public to inmates by using the inmates on work squads. Custody of prisoners is a function and power of government. Government officials, because of their capacity as government officials, were able to impose a loss on the plaintiff, and there was a misuse of power made possible only because the government was clothed with authority of State law.

Cornelius merely reiterated the Eleventh Circuit's earlier holding that a citizen has a Section 1983 claim when a governmental defendant fails to provide adequate protection and the governmental defendant has a special relationship with the plaintiff or the governmental defendant is aware of a special danger to the plaintiff. The Fifth Circuit in this case has merely held that a governmental employee cannot recover from a governmental employer where all the government did was act as an employer and no abuse of governmental power is involved. The Fifth Circuit did not hold in this case that a governmental employee who can allege an abuse of governmental power, as did the plaintiff in *Cornelius*, does not have a Section 1983 claim against the governmental entity. The Eleventh Circuit's holding in *Cornelius* is thus not in conflict with the Fifth Circuit's holding in this case.

Petitioner also claims that the Fifth Circuit's holding is in conflict with the Third Circuit's holding in *Stoneking*. Petitioner is again incorrect. *Stoneking* involved a suit against a school district and school officials arising out of sexual assaults on a student by a schoolteacher. The Third Circuit held that the student could bring such a claim against the defendants if the student could prove a policy, practice, or custom which directly caused her constitutional harm. This holding is not in conflict with the Fifth Circuit's holding in this case. *Stoneking* did not involve a government employee as plaintiff and did involve an abuse of government power. The Plaintiff was a public school student and was, in that sense, in the custody of the school system and school officials when the alleged misconduct occurred. The teacher, the school district, and the school officials were able to impose a loss on the student because a government was acting in its capacity as government. Further, the misuse of power was made possible only because the school district was clothed with authority of State law. Therefore, use of governmental power was not an issue in *Stoneking*, and there is no conflict between this case and *Stoneking*.

All of the cases cited by Petitioner as being in conflict with the Fifth Circuit's opinion in this case, with the exception of *Ruge*, are not in conflict with this case and instead fit within the framework of Section 1983 liability. To establish Section 1983 liability, a plaintiff must, in addition to showing a constitutional deprivation, show either: (1) that the state by the affirmative exercise of its powers so restrains an individual's liberty that it renders the individual unable to care for himself, or (2) that a governmental official, because of his unique position as

such, was able to impose a loss on an individual, or (3) that there was a misuse of power made possible only because the governmental entity was clothed with authority of state law. *Collins*, 916 F.2d at 291 (citing *DeShaney*, 109 S.Ct. at 1005, 103 L.Ed. at 261-62; *McClary*, 786 F.2d at 89; and *Rankin*, 762 F.2d at 449). In *Stoneking* and *Cornelius*, the plaintiffs were able to properly allege that a government official, because of his unique position, was able to impose a loss or that there was a misuse of power made possible only because the entity was clothed with authority of state law. However, Petitioner herein is unable to allege any one of the three aforementioned requisites for meeting the use of governmental power standard or element, a requirement for imposing Section 1983 liability.

The City freely admits that there is a conflict between the Fifth Circuit's holding in this case and the Eighth Circuit's holding in *Ruge*. *Ruge*, however, stands alone as an isolated misinterpretation of this Court's holding in *Canton*. We have found no other cases which adopt the *Ruge* analysis. This Court need not and should not grant the Petition for Writ of Certiorari simply to correct the one-time mistake found in *Ruge*.

Second Ground – Alleged Right to a Safe Workplace

Petitioner's second basis for urging the Court to grant the Petition for Writ of Certiorari is the contention that this Court should take the case in order to resolve the reach of *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). Petitioner further argues that the Texas Hazard

Communication Act creates a substantive due process right to a safe workplace.

Petitioner is, in effect, asking this Court to grant the Petition for Writ of Certiorari in order to decide an issue that is not of importance to the case. For Petitioner to have a Section 1983 claim against the City, Petitioner must prove an abuse of government power. Without an abuse of government power, the secondary issue of whether there is a constitutional right to a safe workplace is moot. This Court should not take this case in order to issue an advisory opinion as to whether there is a constitutional right to a safe workplace.

Furthermore, the Court need not take the case to state what all of the courts to have addressed the issue other than the Eighth Circuit seem to understand. There is no constitutional right to a safe workplace. *Washington*, 802 F.2d at 1481 ("We have found no cases holding that an employee's right to a safe workplace is secured by anything other than the state law of tort"); *Walker*, 791 F.2d at 510-11 ("We therefore hold that the due process clause does not assure safe working conditions for public employees."); *McClary*, 786 F.2d at 88-89; *Rankin*, 762 F.2d at 448. To create such a right would give government employees a substantive due process right which private employees do not have and would vastly increase tort claims, clothed as constitutional claims, against municipalities and other governmental entities.

As this Court stated in *Daniels v. Williams*, the Constitution does not exist to supplement traditional tort law:

> Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. We have previously rejected reasoning that "would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states," *Paul v. Davis*, 424 U.S. 693, 701 [96 S.Ct. 1155, 1160, 47 L.Ed.2d 405] (1976), quoted in *Parratt v. Taylor*, 451 U.S. [527], at 544 [101 S.Ct 1908, 1917, 68 L.Ed.2d 420].

474 U.S. 327, 332, 106 S.Ct. 662, 665, 88 L.Ed.2d 662, 669 (1986). Petitioner has whatever remedies she might have under traditional tort law; she does not, however, have a Section 1983 claim against the City.

CONCLUSION

Petitioner's argument, if adopted, would convert Section 1983 into an ordinary tort statute. Petitioner would have a government entity held liable to a government employee whenever a certain standard of fault is met, regardless of whether there is an abuse of government power. This Court has repeatedly stated that it will not so convert Section 1983. The Fifth Circuit correctly understood the clear position of this Court on that subject when it wrote in *Rankin*: "[T]o predicate liability under Section 1983 totally on the mere degree of fault would be to convert the due process clause into an ordinary tort statute and to lose sight of the fact that Section 1983 is directed at the abuse of power made possible only because the wrongdoer is clothed in the authority of State law." 762 F.2d at 447-48. The District of Columbia, Second

and Seventh Circuits have also had no difficulty understanding Supreme Court authority on the issue presented by this case. This Court need not take this case to reiterate its position that it will not convert Section 1983 into an ordinary tort statute.

For all of the foregoing reasons, Respondent, the City of Harker Heights, Texas, respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

ROY L. BARRETT
STUART SMITH
NAMAN, HOWELL, SMITH & LEE
P. O. Box 1470
Waco, Texas 76703
(817) 755-4100